

and guarantee immunity. Third, although there is a limit beyond which Congress cannot go in granting immunity,³³ the work being carried on by these contractors is so vital to the needs of the Government that, since Congress could presumably create a governmental agency for the task,³⁴ it could likewise constitute these contractors governmental instrumentalities and grant them specific tax immunity.³⁵ It would be possible however, for the states to thwart the Federal Government's efforts at tax avoidance by changing from a buyers' to a sellers' sales tax,³⁶ since, as the present case establishes, the test for governmental immunity is whether the tax is placed "directly" on the Government. The tax would probably be shifted to the buyer, but the fact that Government costs might be increased "would not invalidate the tax,"³⁷ and a tax which constitutes the seller a taxpayer instead of a mere tax collector, as he is under a buyers' tax,³⁸ is sufficiently indirect to preclude governmental immunity.³⁹

Torts—Duty of Landlord toward Invitee or Licensee—[England].—The plaintiff, paying a business visit to a tenant, was injured when the elevator in the defendant

tractors to bind the Government to pay. Before the Government became liable for the costs the approval of a Contracting Quartermaster was required.

³³ Limitation on the taxing power "cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax or the appropriate exercise of the functions of the government affected by it." *Metcalfe & Eddy v. Mitchell*, 269 U.S. 514, 524 (1926); see *Thomson v. Pacific R.*, 9 Wall. (U.S.) 579, 588 (1869).

³⁴ *Ashwander v. TVA*, 297 U.S. 288 (1936); *Osborn v. Bank of the United States*, 9 Wheat. (U.S.) 738 (1824); *McCulloch v. Maryland*, 4 Wheat. (U.S.) *316 (1819).

³⁵ Statutory immunity was denied to these contractors when the House refused to enact the Senate's amendment allowing the Secretary of the Navy to denominate contractors agents of the United States for purposes of the contract and to avoid all taxes. 86 Cong. Rec. 7518-19, 7527-35, 7648 (1940). Under *Pittman v. HOLC*, 308 U.S. 21 (1939), such a grant would seem valid, since the function is essentially governmental. The Court has indicated that Congress has power under the Constitution to grant a broader immunity than would be implied from the Constitution alone. *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 581 (1928); *Thomson v. Pacific R.*, 9 Wall. (U.S.) 579, 589 (1869); see *Helvering v. Gerhardt*, 304 U.S. 405, 411 n. 1 (1938).

³⁶ "Sales taxes" take two legal forms: 1) sales taxes technically upon the *purchaser*, the seller being considered merely a collector for the state, and 2) occupation, license, or privilege taxes upon the *seller* measured by his sales. *Philipsborn, Jr.*, *The Illinois Supreme Court and the Retailers' Occupation Tax*, 31 Ill. L. Rev. 741 (1937). A bare majority of the states have sellers' taxes. Brief for the United States in the United States Supreme Court, *Alabama v. King & Boozer*, App. B, at 29 et seq. The Alabama tax is a buyers' tax. *King & Boozer v. State*, 3 So. (2d) 572, 578 (Ala. 1941). A use tax could not be changed from a buyers' to a sellers' tax because it falls on the purchaser, and the states could not thwart the Government's avoidance of use taxes. Cf. *Curry v. United States*, 62 S. Ct. 48 (1941).

³⁷ *James v. Dravo Contracting Co.*, 302 U.S. 134, 160 (1937).

³⁸ Note 36 supra.

³⁹ A sellers' tax was apparently approved by the Court in the instant case when it specifically overruled *Graves v. Texas Co.*, 298 U.S. 393 (1936), and *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928), note 20 supra. Cf. *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. (2d) 156, 78 P. (2d) 731 (1938).

landlord's building fell to the bottom of the shaft.¹ The accident was occasioned by the negligent re-fastening of an important part² which had been removed by the defendant repairman, who had long been under contract to inspect and lubricate the elevator periodically.³ It was held in the King's Bench⁴ that, although the plaintiff was only a licensee on the premises, the landlord, by making the elevator available, offered the plaintiff a gratuitous carriage and was therefore liable for breach of the common law duty of carriers. The defendant repairman was held liable because he had put forth a dangerous article which by its nature could not be examined by its user. On appeal to the Court of Appeal, *held*, the defendant landlord is not liable, since the owner of an elevator is not a carrier and the defendant landlord had adequately discharged his legal duty of care. The court stated in an elaborate dictum that whether the plaintiff was a licensee or an invitee was immaterial. Judgment as to the defendant landlord reversed; judgment as to the defendant repairman affirmed. *Haseldine v. Daw and Son, Ltd.*⁵

The instant case represents a tendency against making liability turn on the application of the older categories of "invitee" and "licensee." By settled English law,⁶ the plaintiff, upon entering premises maintained by the landlord and used in common by the tenants, was a licensee. Accordingly, the only duty owed him by the landlord was to prevent or warn against concealed defects.⁷ American courts have held persons in the plaintiff's class to be invitees,⁸ to whom the landlord owes the duty of taking reasonable care to make the premises reasonably safe.⁹ Traditionally an invitee is defined as one who comes on the premises conferring a benefit on the occupier or at least having

¹ The elevator was operated by an attendant; no negligence was involved in its operation.

² The elevator was powered by a cylinder, the head of which had been removed for lubrication of the mechanism. The workman replaced the cylinder head at a slant, and the unequal strains sheared the fastening bolts. There was a conflict of evidence as to whether the accident would have been possible or probable had the elevator been as good as new.

³ The defendant landlord had no direct warning as to the unsafe condition of the elevator. Note 22 *infra*.

⁴ *Haseldine v. Daw and Son, Ltd.*, [1941] 1 All Eng. Rep. 525 (K.B.).

⁵ [1941] 3 All Eng. Rep. 156 (C.A.).

⁶ *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74 (H.L. 1922). The differences between the English and American law are brought out in contemporary comment on the *Fairman* case. 56 Irish L.T. 293 (1923); 1 Camb. L.J. 347 (1923); 39 L.Q. Rev. 149 (1923); 35 Jurid. Rev. 85 (1923); cf. 32 Yale L.J. 742 (1923); 36 Harv. L. Rev. 485 (1923); see also Winfield, *Torts* 589 (1937). The *Fairman* case amounted to an overruling of *Miller v. Hancock*, [1893] 2 Q.B. 177 (C.A.), which held that the landlord issued an implied invitation to all who did business with his tenants and hence had a corresponding duty. In the instant case there is some discussion as to whether the *Fairman* case did end any further development of the point. *Haseldine v. Daw and Son, Ltd.*, [1941] 3 All Eng. Rep. 156, 164, 165, 180 (C.A.).

⁷ *Branan v. Wimsatt*, 298 Fed. 833 (App. D.C. 1924); *Woodfall, Landlord and Tenant* 813 (Blundell's ed. 1939).

⁸ *Horvath v. Chestnut Street Realty Co.*, 144 S.W. (2d) 165 (Mo. App. 1940); *Brown v. Pepperdine*, 53 Cal. App. 334, 200 Pac. 36 (1921); *Besner v. Central Trust Co.*, 230 N.Y. 357, 130 N.E. 577 (1921). The American rule seems preferable in that it gives the landlord and his insurance company an economic interest in maintaining safe premises.

⁹ *Engdal v. Owl Drug Co.*, 183 Wash. 100, 48 P. (2d) 232 (1935); *Woolworth Co. v. Williams*, 41 F. (2d) 970 (App. D.C. 1930); *Griffith, Duty of Invitors*, 32 L.Q. Rev. 255 (1916).

some business common to both parties,¹⁰ whereas a licensee, although entering by permission or acquiescence, brings no benefit and has no business in common with the occupier.¹¹ But it has long been recognized that there exists a broad twilight zone, within which fall a great number of cases which cannot realistically be placed in one rather than the other of these two categories.¹²

The difficulty of using such categories is increased by the semi-public character of the lobbies and corridors of modern office buildings. It is often to the tenant's interest to have as many people enter the building as possible, and, because of the competition for tenants, this interest might be transferred to the landlord.¹³ The courts have in consequence tried to bring the duty of occupiers into line with the principles of proximate cause by defining as invitees persons whose presence on the premises might be foreseen.¹⁴ Thus they seem to be falling back on the general tort theory of foreseeability as a basis for the extension of liability.

The English and American rules differ further in that the English landlord can delegate his duty of care.¹⁵ Thus in the instant case it was said that even if the plaintiff were an invitee, the landlord had discharged his duty by employing a reliable contractor.¹⁶ Where an elevator is regarded as an inherently dangerous instrument, however, the landlord might be made liable on the ground that in extra-hazardous activities the duty of care cannot be delegated.¹⁷ This position has at times been taken in American cases; some of the older cases have held the elevator owner to be a common carrier.¹⁸ But even those American jurisdictions which regard an elevator as a part of the general premises hold the landlord's duty to be non-delegable.¹⁹

¹⁰ *Indermaur v. Dames*, L.R. 1 C.P. 274 (1866), aff'd L.R. 2 C.P. 311 (Exch. Ch. 1867); Pollock, Torts 407 (Landon's ed. 1939); Prosser, Torts 635 (1941).

¹¹ Winfield, Torts 600 (1937); Prosser, Torts 625 (1941).

¹² 23 Minn. L. Rev. 502 (1939). The duty owed to public officers (e.g., firemen and postmen) has caused particular difficulty. Prosser, Torts 628 (1941).

¹³ See *Haseldine v. Daw and Son, Ltd.*, [1941] 3 All Eng. Rep. 156, 166 (C.A.).

¹⁴ *Powell v. Great Lakes Transit Corp.*, 152 Minn. 90, 188 N.W. 61 (1922). Compare with this direct approach the term "implied invitation." *Lineaweaver v. Wanamaker*, 299 Pa. 45, 149 Atl. 91 (1930); *Besner v. Central Trust Co.*, 230 N.Y. 357, 130 N.E. 577 (1921); Prosser, Torts 640 (1941).

¹⁵ Although Sir Frederick Pollock stated that the duty could not be delegated to an independent contractor, his statement was too broad, and his latest editor points out that in English law this is only true where the visitor enters under a contract. Pollock, Torts 406 n. (c) (Landon's ed. 1939). But see Winfield, Torts 581 n. (d) (1937). In fact situations similar to the instant case, American courts have found the duty non-delegable. *Rizzi v. Ross*, 117 N.J.L. 362, 189 Atl. 110 (1937); *Sciolaro v. Asch*, 198 N.Y. 77, 91 N.E. 263 (1910).

¹⁶ [1941] 3 All Eng. Rep. 156, 170, 171 (C.A.).

¹⁷ On the general law of non-delegable duties and independent contractors, see Prosser, Torts 487 (1941); Steffen, Independent Contractor and the Good Life, 2 Univ. Chi. L. Rev. 501 (1935). Most of the cases holding elevators to be inherently dangerous instruments are suits against the contractor. *Dahms v. General Elevator Co.*, 214 Cal. 733, 7 P. (2d) 1013 (1932); *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 Pac. 832 (1924).

¹⁸ This rule survives in Illinois. *Heffernan v. Mandel Bros., Inc.*, 297 Ill. App. 272, 17 N.E. (2d) 523 (1938). Cf. *Morgan v. Saks*, 143 Ala. 139, 38 So. 848 (1905); *Gibson v. Internat'l Trust Co.*, 177 Mass. 100, 58 N.E. 278 (1900).

¹⁹ *Sciolaro v. Asch*, 198 N.Y. 77, 91 N.E. 263 (1910); 2 Rest., Torts § 425 (1934).

A common rationale is that the duty is non-delegable because the premises are under the landlord's control. Actually, this control is often attenuated, if not fictitious. It has been suggested that the essence of control in these cases is the right to admit or exclude.²⁰ But it is doubtful how far the landlord can go in excluding third parties without giving the tenant constructive eviction. As in many situations involving independent contractors, the label "control" is here used to rationalize a predetermined liability, imposed on the landlord because he is the better loss-bearer.²¹ The facts of the instant case²² indicate that the landlord was guilty of no fault in the moral sense. Yet many American courts would have imposed liability in order to reach the "deeper pocket."²³ Moreover, from the standpoint of the community the risk of liability²⁴ may be too great for some types of socially necessary repairmen to bear, even by insurance.²⁵ It has been suggested that such economic considerations have always lain behind the law of the independent contractor.²⁶ But their rigorous application will tend to exclude both the foreseeability factor and the understanding, express or inarticulate, of the parties as to the responsibility for damage done.²⁷

²⁰ Lord Atkinson in *Cavalier v. Pope*, [1906] A.C. 428, 433 (H.L.).

²¹ Steffen, *op. cit. supra* note 17.

²² The upper and lower courts disagreed in interpreting the facts, the King's Bench holding that the landlord was negligent. If the view of the King's Bench is adopted, it is immaterial whether the landlord or the repairman is held to be liable as long as one of them is, since there is now contribution between joint tortfeasors in England. The Law Reform (Married Women and Tortfeasors) Act, 1935, 25 and 26 Geo. V, c. 30. But if the landlord is held liable, as he would be in America, irrespective of fault, the existence of contribution would probably make no change, since vicarious liability is based on social policy and not on the notions of fault involved in the common law rule against contribution. For a discussion of the effect of statutes allowing contribution, see F. James, *Contribution among Joint Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156 (1941); Gregory, *Contribution among Joint Tortfeasors, A Defence*, 54 Harv. L. Rev. 1170 (1941); Gregory, *Legislative Loss Distribution in Negligence Actions* pt. 2 (1936).

²³ There is reason to doubt that even in England the employer of the defendant repairman should escape liability on the principle of the independent contractor. It is true that the repairman's job was a technical one, but it was regularly done and regularly paid for. The landlord retained and exercised the right of deciding what replacements and repairs, if any, were to be made. The management of the elevator was in the hands of the defendant landlord, and, since he would receive the rewards of efficient operation, he should, according to the "entrepreneur" theory, bear the losses. Douglas, *Vicarious Liability and Administration of Risk*, 38 Yale L. J. 585, 595 (1929).

²⁴ The liability of repairmen to third parties is analogous to that of manufacturers. The three leading cases in the latter field are: *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562 (H.L.); *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85 (P.C. 1935). The general effect of these decisions is that where an article is dangerous in its ordinary use when negligently made, and such danger is reasonably foreseeable by the manufacturer, he is liable to all save the remotest plaintiffs. This doctrine was applied to repairmen in *Dahms v. General Elevator Co.*, 214 Cal. 733, 7 P. (2d) 1013 (1932); *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 Pac. 832 (1924); *Stennett v. Hancock and Peters*, [1939] 2 All Eng. Rep. 578 (K.B.).

²⁵ Thus the only plumber in a small town may have to be kept in business.

²⁶ See Steffen, *op. cit. supra* note 17; Laski, *The Basis of Vicarious Liability*, 26 Yale L. J. 105 (1916).

²⁷ See *Haseldine v. Daw and Son, Ltd.*, [1941] 3 All Eng. Rep. 156, 177 (C.A.). Moreover, the direct application by the courts of economic policy is often extremely difficult.